There remains the question of interest. Counsel for the third defendant urged that interest be given for the taxed costs from 11 September 1991 (date of review by the learned Registrar). I do not think interest ought to be awarded in this case. Article 152 had all the time been in dispute. The amount thereunder therefore had not been finalised. As regards the balance of the taxed costs, it had not been challenged at all and the third defendant could have demanded or enforced payment thereof.

On the facts and circumstances of this case and since the amount under the Article 152 has been reduced but not to extent of that reviewed by the learned Registrar, in the exercise of the discretion of the Court I make no order as to costs of this review before me.

In short, the amount under Article 152 is reduced from RM28,000 to RM18.000 and there be no costs as to this review.

PUBLIC PROSECUTOR

v.

LEE SOON SIAN

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B.
HJ. ISHAK JC
[CRIMINAL TRIAL NO. 58-7-92 (90)
26 DECEMBER 1992]

DANGEROUS DRUGS: Trafficking in opium - Drugs found in blue cloth bag across carrier of motor cycle ridden by accused - Identity of exhibits produced in Court - Whether break in chain of evidence.

SEARCH LIST: Incriminating exhibits listed in search list - Accused signed on search list - Question of caution - Whether signature of accused on search list amounts to confession or mere acknowledgment of receipt of copy of search list - Legal obligation on part of raiding party to prepare and deliver search list under s. 64 Criminal Procedure Code - Whether failure to prepare or produce search list by itself would entitle accused to an acquittal or cast doubt on bona fides of parties conducting search

CAUTIONED STATEMENT: Defence sought to tender carbon copy of cautioned statement during prosecution case through Investigation Officer - Whether carbon copy of cautioned statement admissible - Sections 62,63 and 65 Evidence Act 1950.

EXHIBITS: Fingerprint - Negative fingerprint report in regard to exhibits - Whether knowledge on part of accused in regard to drugs diminished.

The Accused was charged for trafficking in dangerous drugs, to wit "raw opium" (candu mentah) on 13 February 1990 at about 3.15 pm di kawasan kebun ubi, near 40 km, Jalan Ipoh/ Kuala Kangsar, Sungai Siput, an offence under s. 39B(l)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act.

Held:

[1] On all the evidence before the Court, sufficient reasonable doubt had been cast by the defence during the prosecution case itself as to the knowledge and possession of 16.735 kilogrammes of raw opium by the Accused. The prosecution had failed to establish a *prima facie* case which, if unrebutted, would warrant the conviction of the Accused.

[2] The Court, accordingly found the Accused not guilty, acquitted and discharged him without calling for his defence.

[Accused acquitted and discharged without calling for his defence]

Cases referred to:

Shamsudin bin Hassan and Anor. v. PP [1991] 3 MLJ 314 SC/[1991] 3 CLJ 2414 ***(refd)***

Munusamy v. PP [1987] 1 MLJ 492 SC/[1987] 1 CLJ 250 ***(refd)***

Su Ah Ping v. PP [1980] 1 MLJ 75FC ***(refd)***

Abdullah Zawawi v. Public Prosecutor [1985] 2 MLJ 16 SC/[1985] 2 CLJ 2 ***(refd)***

PP v. Gurchan Singh a/l Mall Singh [1990] 2 CLJ 78 ***(refd)***

Public Prosecutor v. Chin Hock Aun [1989] 1 MLJ 517 ***(refd)***

PP v. Rengasamy [1974] 1 MLJ 223 ***(refd)***

San Soo Ha v. Public Prosecutor [1968] 1 MLJ 34 ***(refd)***

Pendakwa Raya v. Ahmad Lated; Pendakwa Raya v. Zakaria bin Ismail [1991] 1 CLJ 71 ***(refd)***

PP v. Lin Lian Chen [1991] 1 MLJ 316/[1990] 2 CLJ 1020 ***(refd)***

PP v. Lin Lian Chen [1992] 4 CLJ 2086 ***(dist)***

Soo Seng Huat v. PP [1968] 1 MLJ 80 ***(refd)***

Chee Chiew Heong v. PP [1981] 2 MLJ 289/[1981] 1 CLJ 43 ***(refd)***

PP v. Yuvaraj [1969] 2 MLJ 89 PC ***(refd)***

Illian & Anor. v. PP [1988] 1 MLJ 421 ***(refd)***

Choo Yoke Choy v. PP [1992] 4 CLJ 1791 ***(foll)***

Public Prosecutor v. Saimin & Ors. [1971] 2 MLJ 16 ***(refd)***

Mohamad Radhi bin Yaacob v. PP [1991] 3 MLJ 169/ [1991] 3 CLJ 2073 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 64

Dangerous Drugs Act 1952, ss. 37(d), 37(da)(v), 39B(1)(a), 39B(2)

Evidence Act 1950, ss. 62, 63, 63(b), 66, 66(b), (d), 65, 114(g)

For the Public Prosecutor - Zulkifli Bakar
For the Accused - Faisal bin Mohd. Hanafiah

JUDGMENT

Hj. Abdul Malik b. Hj Ishak JC:

The Accused was charged as follows:

> Bahawa kamu pada 13 Februari 1990 kira-kira pukul 3.15 petang di kawasan kebun ubi, berhampiran km 40 Jalan Ipoh/Kuala Kangsar, Sungai Siput, dalam Daerah Kuala Kangsar, dalam Negeri Perak Darul Ridzuan, telah mengedar dadah berbahaya iaitu "raw opium" (candu mentah) seberat 16.735 kilograms dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

According to the evidence led by the prosecution, on 12 February 1990 at about 5.00 p.m. Acting ASP Idris bin Ismail (PW5 - Idris), then an officer attached to the Cawangan Anti Dadah, Ipoh rounded up his men, comprising of Inspector Muid bin Bachee (PW6 - Muid), Detective Corporal 70718 Busra Abdul Kadir (PW7-Busra), Detective Corporal Abdul Hadi, Detective Constable 89172 Manimaran a/l Narayan, Detective Constable 83757 Fozi bin Bahari and DPC 102391 Syarifullah bin Masron, for a briefing session.

Idris briefed his men in regard to an ambush that they were supposed to initiate on 13 February 1990 at kawasan kebun ubi, near to km 40 Jalan Ipoh/Kuala Kangsar, Sungai Siput, in the district of Kuala Kangsar. In this regard Idris acted as the operations commander while Muid was assigned as the leader of the ambush party.

On 13 February 1990 at 5.00 a.m. Muid led his police personnel (armed and in civilian clothes) to the scene by police van and arrived there at about 6.00 a.m. Upon arrival, Muid and his team stationed themselves in the midst of the kawasan kebun ubi near to the kebun getah as shown in sketch plan P12 and in photograph P8D. They converged there, hid themselves, remained quiet and kept vigil. It was in evidence that the police party did not investigate the surrounding area.

At 3.00 p.m. Muid divided his team into two groups. The first group was led by Muid himself and it comprised of Busra and Detective Manimaran. The second group comprised of Detective Hadi, Detective Fozi and DPC Syarifullah.

The first group was stationed at point "Y" in sketch plan P12 and the second group was located to the left at point "Z" in sketch plan P12. In fact the first group was located in a hole as shown in photograph P8E. It was in evidence that the hole was big enough to contain the first group. The weather too was good.

Shortly after 3.00 p.m. the sound of motorcycle was heard. Busra who was located in front of Muid, put his head forward and saw a male chinese riding a motorcycle proceeding from the left side passing their location and proceeding to the right side along Jalan Tanah

Merah as indicated by the red arrows in the sketch plan (P12). That male chinese was wearing a white sleeveless T-shirt. While riding the motorcycle in a slow and moderate speed, the male chinese behaved suspiciously, looking to his left and right. That male chinese was not wearing a crash helmet and was not carrying anything with him. That male chinese rode the motorcycle past Busra and Muid (in their hidden positions) till they lost of him. Like Busra, Muid too put his head forward and saw what was happening.

Approximately ten to fifteen minutes thereafter the sound of motorcycle was heard again. This time it came from the direction of the right side along Jalan Tanah Merah and approaching their hideout as shown by the blue arrows in the sketch plan (P12). Busra on the instruction of Muid, cautiously put his head forward and saw the same male chinese riding the same motorcycle bearing registration no: ABE 8159 (P10). That male chinese was not wearing a crash helmet and was wearing a white sleeveless T-shirt. The motorcyclist was travelling at a slow and moderate speed. Busra also saw something blue in colour put across the carrier of the motorcycle, Busra related whatever he saw, like a running commentary, to Muid. According to Muid, Busra told him that he saw one blue cloth put across the front part of the motorcycle. Muid then directed Busra to rush forward and stop the motorcycle when it came nearer to their hideout. Thus, as soon as the motorcycle arrived at their hideout, Busra rushed out and stopped the motorcycle by introducing his office as "Police". Busra demonstrated in Court that he put both his hands high up in the air and shouted "Police" and at the same time with his right hand he held the left handle of the motorcycle. The motorcycle almost fell to its right side with the male chinese still seated astride the motorcycle. The engine of the motorcycle went dead. At the same time Muid who went out of his hiding, rushed to the male chinese followed by the rest of the police party. Muid introduced his office: "Police " loudly to the male chinese, held the left hand of the male chinese and twisted it to the rear. By this time Detective Manimaran came and twisted the right hand of the male chinese to the rear and then handcuffed him. The male chinese was then pulled away from the motorcycle thereby causing it (motorcycle) to fall to the ground.

That male chinese was identified as the Accused.

It was in evidence that when Muid rushed out of the ambush position to arrest the Accused, he too saw the blue cloth bag strung across the carrier of the motorcycle.

While Busra and Detective Manimaran guarded the Accused, Muid took the blue bag (P3B) from the carrier of the motorcycle and examined it in the presence of the Accused. The mouth of the blue cloth bag was folded (tersimpul). Muid opened the fold and took out 2 packages. The smell of candu was in the air. Muid showed the 2 packages to the Accused and then placed i back inside the blue cloth bag. Muid felt with his hands the rest of the packages inside the blue cloth bag and he reckoned it numbered ten in all (including the 2 packages which he placed back inside the blue cloth bag).

Muid then physically examined the Accused and recovered from his right trouser pocket RM1,394 (P13).

After having successfully completed his mission, Muid relayed by walkie talkie the good news at 3.20 p.m. to Idris, who was at that time at Karai police station. Idris had proceeded to Karai police station on the same day (13 February 1990) and arrived there at 1.45 p.m. Idris then instructed Muid to bring the incriminating exhibits and the Accused to Karai police station using a police van. Muid complied.

The same police van (which was used to go to the scene earlier on) was used by Muid to transport the incriminating exhibits and the accused to Karai police station. According to Muid he carried the blue cloth bag (P3B) together with its contents (the 10 packages suspected to be raw opium) and sat at the front passenger's side of the police van next to the driver (DPC Syarifullah). On entering the van Muid placed the blue cloth bag (P3B) together with its contents on the floorboard next to the driver's side. Muid also held the money (P13) recovered from the Accused. Whereas the Accused together with Busra, Detective Manimaran and Detective Constable Fozi entered the rear portion of the police van. Muid instructed Detective Corporal Abdul Hadi to ride the motorcycle (P10) to Karai police station.

On arrival at Karai police station, Muid carried the blue cloth bag (P3B) together with its

contents to the room of the OCS (officer in charge of the station). There Muid lodged a police report *vide* Karai Rept. No. 35/90. Muid then took out the 10 packages from the blue cloth bag (P3B) in the presence of the Accused and marked them as follows:

M1 to M10, Karai Report No. 35/90, 13 February 1990 and his signature appearing thereunder. (Such markings can be seen in photographs P8G and P8H).

According to Muid the 10 packages were then like the ones in photographs P8G and P8H. Now, the 10 packages exhibits P7A to P7J are different.

Muid also marked the blue cloth bag (P3B) with the following markings : Karai Rpt 35/90, M, 13 February 1990 and his signature appearing thereunder. Such markings can be seen in photograph P8I.

A search list (P14) was also prepared by Muid and was signed by the Accused.

Thereafter, Muid handed the blue cloth bag (P3B) together with its contents (P7A to P7J), the money (P13), the motorcycle (P10), the two keys to the motorcycle (P10A and B), the search list (P14) to the investigating officer, Acting DSP Zulkifli bin Ahmad (PW8 - Zulkifli).

On receipt of the exhibits from Muid, in particular the blue cloth bag (P3B) together with its incriminating contents (P7A to P7J), Zulkifli brought the said exhibits with him to visit the scene of the crime and then returned to Sungai Siput (U) police station and had the exhibits photographed. Thereafter Zulkifli marked, packed and scaled the exhibits (P3B, P7A to P7J) with PDRM 110. On 14 February 1990 at 12.40 p.m. Zulkifli sent these exhibits to the Government chemist (PW1).

The contents of exhibits P7A to P7J were, upon analysis by the Government Chemist (PW1) confirmed to be 16.735 kilogrammes of raw opium as defined in the Dangerous Drugs Act 1952 and constituted the subject matter of the charge.

The defence challenged the chain of evidence in regard to the movements of the incriminating exhibits in particular the blue cloth bag (P3B) and the drugs (P7A-P7J). To recapitulate there was evidence that Muid seized the blue cloth bag (P3B) with its contents (the drugs - P7A to P7J) from the motorcycle (P10). Muid examined the contents (two packages only) of the drugs at the scene and then he put them back inside the blue cloth bag (P3B). When the van arrived to bring the Accused and the police party to Karai police station, Muid carried the blue cloth bag (P3B) with its contents (the drugs - P7A to P7J) to the front left side of the van next to the driver of the van. This was corroborated by Busra. The blue cloth bag and the drugs were placed on the floorboard of the front left side of the van when the van was in motion. The driver of the van was Constable Syarifullah. The Accused, Busra and two other police personnel sat at the rear of the van. As soon as the van arrived at Karai police station, Muid again carried and brought down the blue cloth bag containing the drugs straight into the office of the OCS. This was corroborated by Busra.

In the OCS's office Muid lodged a police report and then marked the blue cloth bag as follows: Karai Rpt. 35/90, M, 13 February 1990 and initialled it (see photograph P8I) Muid als marked each of the 10 packages of raw opium as M1 to M10. Other markings made by Muid on all the 10 packages of raw opium were as follows: Karai Rpt. 35/90, 13 February 1990 and his initial (see photographs P8G and H). Having done so Muid then handed the blue cloth bag and the 10 packages of raw opium to Zulkifli (the I.O. of the case). This was on 13 February 1990 at 4.45 p.m.

Thereafter Zulkifli proceeded to the scene with the police party. In so doing, Zulkifli brought along the blue cloth bag containing the 10 packages of raw opium. According to Zulkifli he put all the 10 packages of raw opium inside the blue cloth bag and requested Detective Sergeant 56514 Mohd. bin Abdullah to carry it into the boot of a police car WBQ 602 (a Proton Saga as can be seen in photograph P8A). Zulkifli stated that Detective Sergeant Mohd merely carried the blue cloth bag containing the 10 packages of raw opium. And that Detective Sergeant Mohd. did not open the blue cloth bag. The boot of the police car WBQ 602 was opened by the driver (Lance Corporal 50569 Alias).

Zulkifli was at the scene for 30 minutes. In the course of which Zulkifli walked away from the police car WBQ 602 in order to investigate the scene of the crime. At that time the blue cloth bag and the 10 packages of raw opium were inside the boot of the said car. The police car with the exhibits inside the boot were guarded by Inspector Mohd. Rejab, Detective Sergeant

Mohd. bin Dollah, Detective Constable 85255 Che' Abidin bin Ajib and Lance Corporal 50569 Alias. According to Zulkifli, at the scene, he did not direct any of his police personnel to take out disturb, hold or do anything with the exhibits that was in the boot of the said car. In short, according to Zulkifli throughout the duration of the period when he was at the scene no one tampered with the exhibits in the boot of the said car.

From the scene of the crime, Zulkifli returned to Sungai Siput (U) police station on the same day and arrived there at about 6.15 p.m. On arrival, Zulkifli carried the blue cloth bag containing the 10 packages of raw opium from the boot of the said car assisted by Inspector Mohd. Rejab and Detective Sergeant Mohd. bin Dollah to his office. Thereafter in his office Zulkifli marked each of the 10 packages of raw opium as Z1 to Z10. Zulkifli also wrote "13 February 1990" on each of the 10 packages of raw opium followed by his signature. The blue cloth bag was also marked by Zulkifli with "Z12", followed by his initial and the date that is 13 February 1990 (see photograph P8I).

After having marked the blue cloth bag and the 10 packages of raw opium, Zulkifli directed Constable 92520 Mohd. Ali bin Ibrahim (PW2-Ali) to take photographs of the blue cloth bag (P8I) and the 10 packages of raw opium (P8G and H).

Zulkifli then packed the blue cloth bag and the 10 packages of raw opium for onward transmission to the government chemist. In regard to the blue cloth bag, Zulkifli put it inside an envelope P3A) and he marked "Z12" on it. In regard to the 10 packages of raw opium he put it inside a big plastic bag marked 'Z11' which was in turn put inside a box wrapped with a brown paper marked "Z17" - (the package).

Zulkifli then sealed the envelope and the package with police seal that is "Polis Di Raja Malaysia 110". Subsequently the envelope and the package were sent to the government chemist (PW1) for analysis. In her evidence the government chemist (PW1) confirmed the presence of the police seal on the envelope and the package. According to the government chemist (PW1) she had to remove the police seal before examining the envelope and the package.

Upon examination and analysis, the government chemist repacked and resealed the exhibits bearing chemist seal, that is, "Jabatan Kimia 2 Ipoh". Zulkifli collected the sealed envelope and the sealed package from the government chemist and kept them inside the safe of the office of KPD Sungai Siput. The two relevant KPDs were called as prosecution witnesses *viz,* Superintendent Thor Sueh Meng (PW9) and DSP Abdul Malik bin Mohd. (PW10).

It was in evidence that Zulkifli brought the envelope bearing the chemist seal and the package bearing the chemist seal to this court on the first day of the hearing. The seals were intact.

The learned defence counsel argued that there was a failure to call the following police personnel for the following reasons and thus there was a break in the chain of evidence:

(1) Constable Syarifullah the driver of the van that brought Muid and police party from the scene of the crime to Karai police station. Constable Syarifullah could corroborate Muid in regard to the question of who carried the blue cloth bag containing the drugs inside the van.

(2) Detective Sergeant 56514 Mohd. bin Dollah who helped Zulkifli to carry the blue cloth bag containing the drugs from the Karai police station to the boot of the police car WBQ 602. The boot of said car was opened by the driver, one Lance Corporal 50569 Alias.

(3) Inspector Mohd. Rejab, Detective Sergeant 56514 Mohd. bin Dollah, Detective Constable 85255 Che Abidin bin Ajib and Lance Corporal 50569 Alias that guarded the police car WBQ 502 with the blue cloth bag containing the drugs in the boot of the said car while Zulkifli investigated the scene of the crime for half an hour.

Lance Corporal 50569 Alias so submitted the learned defence Counsel should be called as he held the keys to the boot of the police car and he could verify whether the boot was empty or whether the boot was occupied with other police exhibits before the blue cloth bag containing the drugs were put inside it.

(4) Inspector Mohd. Rejab and Detective Sergeant 56514 Mohd. bin Dollah that assisted Zulkifli in carrying the blue cloth bag containing the drugs from the boot of the police car to the office of Zulkifli in Sungai Siput (U) police station.

In *Shamsuddin bin Hassan and Anor. v. PP* [1991] 3 MLJ 314 SC the drugs that were handed over to the chemist were not marked until it was packed six days after the investigating officer had received it from PW4 (a policeman in the first car). There was no explanation what PW4 did with the drugs for more than five hours before he handed it over to the investigating officer. The Supreme Court held (per Harun Hashim SCJ) that there were serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in Court. His Lordship held that on this ground alone, the appellants should not have been called up to enter on their defence. Accordingly the appellants were acquitted and discharged.

In *Munusamy v. PP* [1987] 1 MLJ 492 SC, his Lordship Mohamed Azmi SCJ was of the view that there was overwhelming evidence that the cannabis produced in court was indeed the one recovered by the police from the appellant and the evidence was sufficient to rebut any adverse inference under s. 114(g) of the Evidence Act 1950 so as to render the calling of the typist as a prosecution witness, to show the clerical mistake in addressing the exhibit, wholly unnecessary.

In *Su Ah Ping v. PP* [1980] 1 MLJ 75FC, his Lordship Suffian LP had this to say in regard to the break in the chain of evidence:

> It is unnecessary to call evidence to ensure that there is no break in the chain of evidence. If the officer who picked up the object at the scene produced it and identified it as that very object that is enough and there is no need to call every other officer who handled it, unless there is doubt as to the identity.

On appraisal of the evidence, there was a doubt as to the identity of the exhibits (the blue cloth bag and the 10 packages of raw opium) and therefore there was a need to call the police personnel complained of by the learned defence counsel especially the driver of police car WBQ 602, one Lance Corporal 50569 Alias who opened the boot of the police car to enable the exhibits (the blue cloth bag and the 10 packages of raw opium) to be kept therein. That Lance Corporal 50569 Alias would certainly be able to enlighten the Court as to the following salient points:

(a) whether the boot of the police car was empty?

(b) whether the boot of the police car was occupied with other police exhibits? - and if so the possibility of a mix up would be more real than imaginary. It must be borne in mind that the Government Chemist (PW1) gave evidence that the raw opium was soft externally and internally when she first examined it. Even in Court, the Government Chemist (PW1) confirmed that the outer portion of the raw opium was partially hardened but it was soft internally. The Government Chemist (PW1) poked her fingers inside the 10 slabs of raw opium and confirmed that internally they were still soft and sticky. Even though Muid marked the blue cloth bag and the 10 packages containing raw opium immediately upon arrival at Karai police station from the scene of the crime, it must be noted that the 10 packages were marked **but not the raw opium in question.** The soft nature of the raw opium would surely prevent any marking to be made on it;

(c) whether the police party comprising of Inspector Mohd. Rejab, Detective Sergeant 56514 Mohd. bin Dollah, Detective Constable 85255 Che Abidin bin Ajib and Lance Corporal 50569 Alias **himself actually guarded** the police car for a solid half an hour when Zulkifli investigated the scene of the crime? Now, we have only the uncorroborated evidence of Zulkifli that the police personnel guarded the police car for the duration of half an hour while he (Zulkifli) was busy investigating the scene of the crime. How could Zulkifli be certain of this? His attention at that time was focussed on the scene of the crime and not on the police car.

Since there was a doubt as to whether the raw opium produced in court, were indeed the ones recovered by Muid from the Accused and the available evidence were insufficient to rebut the adverse inference under s. 114(g) of the Evidence Act 1950, it can therefore be correctly stated that the calling of the police personnel itemised by the learned defence Counsel, especially Lance Corporal 50569 Alias, became necessary (see *Munusamy v. PP* (*supra*)). In short, the prosecution failed to adduce sufficient evidence relating to the exhibits until they reached this Court. Without the evidence of Lance Corporal 50569 Alias, the Court cannot be sure and cannot indulge in the realm of

conjecture and possibility (see per Salleh Abas LP in *Abdullah Zawawi v. Public Prosecutor* [1985] 2 MLJ 16 SC especially page 19). On this ground alone, the Accused should not be called to enter on his defence and accordingly should be acquitted and discharged (see *Shamsuddin bin Hassan* (*supra*)).

There remains one point to be clarified and that is the search list (P14). Both the learned deputy and the learned defence Counsel agreed that the search list should be marked as an exhibit (P14) as it is admissible in evidence. However, the learned defence Counsel submitted further that the search list (P14) should not be construed as a confession by the Accused in regard to the incriminating exhibits.

In *PP v. Gurchan Singh a/l Mall Singh* [1990] 2 CLJ 475 the Court questioned the failure of the prosecution to produce the search list.

In *Public Prosecutor v. Chin Hock Aun* [1989] 1 MLJ 517 it was held that there was no legal obligation on the part of the raiding party to prepare and deliver a search list under the terms of s. 64 & 65 of the Criminal Procedure Code.

In *San Soo Ha v. Public Prosecutor* [1968] 1 MLJ 34 it was held that the failure to prepare a search list by itself would not entitle the appellant to an acquittal. Such failure would only cast doubt on the *bona fides* of the parties conducting the search.

In *Pendakwa Raya v. Ahmad Lateh, Pendakwa Raya v. Zakaria bin Ismail* [1991] 1 CLJ 71 it was held *inter alia* that:

(a) hakikat bahawa OKT1 dan OKT2 menurun tandatangan mereka di atas senarai bongkar tidak menjadikan senarai bongkar itu pernyataan atau pengakuannya.
(b) senarai bongkar dikemukakan dan diterima sebagai ekshibit bukan untuk membuktikan sesuatu tetapi untuk menolak sebarang tohmah berkenaan barang-barang, terutama sekali yang bernilai, yang dirampas.
(c) amalan menyediakan dan mengemukakan senarai bongkar eloklah diteruskan walaupun tiada obligasi undang-undang untuk menyediakannya.

For my part, I am of the considered view that the production of the search list should be continued as it would invariably show the integrity of the officer that conducted the search and no more. The search list cannot be construed to be confession of the Accused. The signature of the Accused on the search list would be akin to an act of acknowledgement just like the Accused acknowledging the receipt of the chemist report.

At any rate, in the course of the trial, I did not place too much emphasis on the search list and its reception has not influenced me in coming to a decision whether the prosecution has proved its case beyond reasonable doubt.

It is also pertinent to point out that the photograph P8N was not taken into consideration by me, and it has not influenced me in coming to a decision whether the prosecution has proved its case beyond reasonable doubt. That photograph P8N was clearly inadmissible, it was taken after the Accused was placed under arrest.

However, while Zulkifli was giving his evidence, the defence sought to tender the carbon copy of the cautioned statement of the Accused as defence exhibit. The learned Deputy strenously objected on the following grounds:

(1) The cautioned statement of the Accused can only be admitted through the recorder, *viz* Inspector Jude Pereira.
(2) The maker of the cautioned statement that is Inspector Jude Pereira must be called.
(3) Any document intended to be produced as evidence must be the original document, the primary evidence under s. 62 of the Evidence Act.
(4) if the document intended to be produced as evidence was not the original document, then it must be proved to the satisfaction of the court that that document was a document classified as secondary evidence under s. 63 of the Evidence Act and admissible under s. 65 of the Evidence Act. The onus would be on the defence. Thus, so submitted the learned deputy, the carbon copy of the cautioned statement *per se* cannot be said it to be secondary evidence and hence inadmissible under the law.

The defence argued that they were entitled in the course of the prosecution's case to tender the carbon copy of the cautioned statement

through Zulkifli, the investigating officer of the case. Further, it was argued that the carbon copy of the cautioned statement is admissible as primary evidence under s. 62 of the Evidence Act.

Justice Mohtar Abdullah in the case of *PP v. Lin Lian Chen* [1991] 1 MLJ 316 allowed the defence to introduce the Accused's original cautioned statement in evidence during the prosecution case as a defence exhibit. His Lordship stated that such a statement can be introduced through the investigating officer who has the original statement within the possession or power and that the defence has a right to establish reasonable doubt on the prosecution case during the case for the prosecution itself.

On appeal to the Supreme Court, his Lordship Edgar Joseph Jr. SCJ delivering the judgment of the Court (*PP v. Lin Lian Chen* [1992] 4 CLJ 2086) held that the decision of the trial judge allowing the defence to introduce the exculpatory statement of the respondent through cross-examination of the investigating officer during the case for prosecution, was correct. The defence was entitled to elicit by cross-examination of prosecution witnesses, oral evidence or documentary evidence in order to destroy the case for the prosecution or to support its own case, subject to the principle of Crown Privilege.

However, *PP v. Lin Lian Chen* (*supra*) can be distinguished from the instant case, in the former case, the original copy of the cautioned statement kept by the investigating officer in the investigation file was successfully tendered as a defence exhibit during the prosecution case. Whereas in the instant case, the carbon copy of the cautioned statement kept by the investigating officer in the investigation file was successfully tendered as a defence exhibit during the prosecution case. In regard to the original copy of the cautioned statement kept by the investigating officer, his Lordship Edgar Joseph Jr. SCJ in the case of *PP v. Lin Lian Chen* (*supra*) had this to say:

> Where, of course, a document is elicited in this way, on general principle, its author would have to be called unless he is dead or untraceable or **cannot for any other satisfactory reason be called,** in which case someone having personal knowledge of the contents thereof (see e.g. *Tan Siak Heng v. Rex* [1950] 16 MLJ 214) or saw him write it or is acquainted with his handwriting, would have to be called to prove its contents.

In another part of the judgment, his Lordship Edgar Joseph Jr. SCJ said that:

> ... the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing, in other words, it was the respondent who was the author thereof and who had himself wished it to be admitted, it being acknowledged by him in the cautioned statement it self, that it was made voluntarily after the administration of the statutory caution.

Again in another part of the judgment, his Lordship Edgar Joseph Jr. SCJ said that:

> ... we recognise that viewed from another angle, it may not be incorrect to regard the recording officer of a cautioned statement by an Accused, to be also maker of the statement while the Accused would be the supplier of information contained in writing in the course of the performance by the writer of a duty to record information supplied to him by the Accused who may reasonably be supposed to have personal knowledge of such information.

In this case there was evidence that Zulkifli obtained the carbon copy of the cautioned statement from the recording officer (Inspector Jude Pereira) for the purpose of completing his investigation file. Zulkifli requested for the carbon copy from the said Inspector. There was also evidence that if Zulkifli were to ask for the original copy of the cautioned statement, the said Inspector would have obliged. Under cross-examination Zulkifli was requested to compare the carbon copy of the cautioned statement with the photocopy of the cautioned statement supplied to the defence. The photocopy was a certified true copy signed by the Ketua Polis Daerah of Sungai Siput (U) Perak. After comparison, Zulkifli categorically stated that he was positive that they were the same. The learned deputy did not call Inspector Jude Pereira. He indicated that he would not be calling Inspector Jude Pereira. In fact, Inspector Jude Pereira was offered to the defence at the close of the case for the prosecution. It is trite law that the defence has the inherent right to establish reasonable doubt on the prosecution case during the case for the prosecution itself, so that if no *prima facie* case is thereby established, the Accused may be acquitted and discharged without his defence being called.

I do and I so hold that the carbon copy of the cautioned statement (handwritten) is a document made by one and the same uniform process as the top copy and therefore it is admissible under s. 62 of the Evidence Act 1950 (see *PP v. Rengasamy* [1974] 1 MLJ 223). It would of course be ideal if the defence could produce the original instead of the carbon copy. But it must be borne in mind that the defence sought to produce as defence exhibit the carbon copy of the cautioned statement of the Accused during the prosecution stage through the investigating officer. Zulkifli. As has been said by his Lordship Edgar Joseph Jr. SCJ in the case of *PP v. Lin Lian Chen* (*supra*) the Accused can be said to be the author of the cautioned statement made voluntarily by him after due administration of the statutory caution.

There is a satisfactory reason for the non-production of the original of the cautioned statement. It is still with the recording officer (Inspector Jude Pereira). The author (if it is construed that the recording officer is the author), as stated by his Lordship Edgar Joseph Jr. SCJ in *PP v. Lin Lian Chen* (*supra*)) cannot be called until after the close of the prosecution case. Bearing in mind that the defence should not be prevented to produce evidence central to his defence at the prosecution stage, then the defence rightly adopted the stand to introduce the carbon copy of the cautioned statement as defence exhibit D15.

Alternatively since the original of the cautioned statement was with the recording officer, the carbon copy of the cautioned statement becomes admissible under the combined provisions of s. 65 and 63(b) of the Evidence Act 1950. On this score there is no necessity for the defence to give notice to the prosecution to produce under s. 66 of the Evidence Act 1950 as:

(1) the adverse party must know that he will be required to produce it (see s. 66(b) Evidence Act 1950).
(2) the adverse party or his agent has the original in Court (see s. 66(d) Evidence Act 1950).

Accordingly the carbon copy of the cautioned statement was marked as defence exhibit D15.

The cautioned statement, made one day after the Accused's arrest was exculpatory in nature. The Accused narrated in the cautioned statement as to how he went to the scene of the crime. He stated that two days ago (that was 12 February 1990) he received a telephone call from his friend by the name of Ah Hoong who enquired as to whether he (Accused) wanted to use any money. On answering in the affirmative Ah Hoong told him to proceed to a deserted empty house near a fish pond on 13 February 1990 after 12.00 noon. That fish pond was near to a "kilang kicap" at Salak Baru. He requested the Accused to collect one blue package inside the deserted empty house. He also told the Accused that there was one package containing cash to the tune of RM1,500 wrapped in a chinese newspaper. That money was meant for the Accused for "tambang kereta". The Accused was requested by Ah Hoong to bring the blue package to Ipoh and to place it at a bicycle stand near to the toilet of the Ipoh bus station. The Accused agreed to the suggestion of Ah Hoong.

In the cautioned statement, the Accused further stated that on 13 February 1990 at about 1.15 p.m. he proceeded to that place on a motorcycle bearing registration no: ABE 8159 which he borrowed from another friend by the name of Ah Woon. On reaching the deserted empty house he stopped his motorcycle and entered the said house. On entering the said house he found one blue package and another package wrapped with newspaper. Both these two packages were located on the floor near to the entrance of the said house. The Accused admitted taking and opening the package wrapped in newspaper and found in it RM50 notes, but he did not count them. The Accused took the money and put it inside his pocket. Then the Accused carried the blue package and put it on the motorcycle, started the engine of the motorcycle and proceeded home. Subsequently the Accused was detained by a group of people who identified themselves as "police". The police seized the blue package, arrested him and brought him to Karai police station.

In the cautioned statement the Accused denied knowledge of the contents of the blue package. The Accused also stated that during the telephone conversation Ah Hoong did not tell him about the contents of the blue package. This is what the Accused said in his cautioned statement:

S. Adakah kamu tahu apakah kandungan dalam bungkusan biru itu?

J. Saya tidak tahu. Saya kemudian ditunjukkan kandongan itu dan saya difahamkan oleh seorang anggota polis bahawa itu adalah dadah candu.

S. Semasa percakapan talipon di antara kamu dengan Ah Hoong, adakah Ah Hoong memberitahu kamu apakah di dalam bungkusan biru itu?

J. Tidak.

In the cautioned statement the Accused was asked as to whether he suspected the package to contain drugs. The Accused replied that he suspected the package to contain drugs but he was told by Ah Hoong that it was not drugs and was told not to be afraid. This is what the Accused said in his cautioned statement:

S. Adakah kamu syak bungkusan yang diberitahu oleh Ah Hoong itu ada kemungkinan berisi dadah?

J. Saya mengesyaki barang itu kemungkinan dadah tetapi saya diberitahu oleh Ah Hoong bahawa barang itu bukan dadah dan minta saya jangan takut.

The cautioned statement was read back to the Accused and he did not want to make any amendments to it.

At the close of the case for the prosecution, I considered all the available evidence including the cautioned statement (D15) in the context of the presumption raised under s. 37(d) of the Dangerous Drugs Act 1952 that the Accused had possession of the 10 packages (P7A to P7J) and that he knew that it contained raw opium and in the context of the presumption raised under s. 37(da)(v) of the Dangerous Drugs Act 1952 that since the raw opium was 16.735 kilogrammes that he trafficked in it. In doing so I bore in mind the law that a presumption can be rebutted from the evidence adduced by the prosecution (see *Soo Seng Huat v. PP* [1968] 1 MLJ 80 and *Chee Chiew Heong v. PP* [1981] 2 MLJ 289). I also took into account the law that the presumptions in the Dangerous Drugs Act 1952 can be rebutted on the balance of probabilities (see *PP v. Yuvaraj* [1969] 2 MLJ 89 PC and *Illian & Anor. v. PP* [1988] 1 MLJ 421). At this juncture the following salient points can be discerned.

(1) When Busra and Muid first saw the Accused riding the motorcycle (P10) at a slow and moderate speed, looking suspiciously to his left and right two things can be inferred from it. Firstly, that the Accused was trying to locate the deserted empty house. The following facts would bear out this inference. Muid and his party did not investigate the surrounding area when they first arrived at the scene. The first sketch plan (P12) did not incorporate the location of the deserted empty house until the second sketch plan (P12A) and the third sketch plan (P12B) were tendered. Even the first batch of photographs (P8A to P8L) did not show the deserted empty house. It was only the second batch of photographs P8M, P80 and P8P that the deserted empty house could be seen. Looking at the first batch of photographs (P8A to P8L) it can safely be inferred (and that is the correct inference) that when the police party first arrived at the ambush position no one saw the deserted empty house. Thus, it was no wonder that the Accused behaved the way he did while riding the motorcycle at the scene of the crime. Secondly, the road was bad thereby forcing the Accused to reduce speed (see photograph P8C in particular).

(2) The Accused admitted in his cautioned statement putting RM50 denominations without knowing its exact amount inside his pocket upon discovering the money as promised by Ah Hoong in the deserted empty house. The police, especially Muid, upon making a bodily search on the Accused found RM1,394 (P13) from the Accused's right trouser pocket. Muid's version in regard to the recovery of the money (P13) has been explained by the Accused in his cautioned statement.

(3) In the cautioned statement the Accused stated that the police stopped his motorcycle and arrested him without much hassle. The way Busra and Muid testified in regard to the arrest of the Accused at the scene, it can reasonably be inferred that the arrest was effected easily. It can also be reasonably inferred (and that is the correct inference) that the Accused was arrested without putting up any struggle nor did he attempt to run away nor did he try to throw the blue cloth bag (P3B) and its contents (P7A to P7J). Seen in this light the exculpatory part of the

cautioned statement especially that part where the Accused stated that he did not know the contents of the blue cloth bag (P3B), can be appreciated fully. Thus, at the time of the arrest the Accused did not have the knowledge of the existence of the drugs in the blue cloth bag P3B.

(4) In regard to the question of knowledge, in the cautioned statement the Accused admitted carrying and putting the blue cloth bag (P3B) onto the motorcycle. There was nothing in the cautioned statement to show that the Accused opened the blue cloth bag (P3B). On the other hand when Busra and Muid together with Detective Manimaran had arrested the Accused and when Muid opened the fold of the blue cloth bag (P3B), the smell of candu filled the air. Thus, in not opening the blue cloth bag earlier on in the deserted empty house and being deprived of the smell of candu in the air, how can it be said that the Accused had knowledge that the blue cloth bag (P3B) contained drugs. In fact, in the cautioned statement the Accused stated that he was told by the police that the blue cloth bag (P3B) contained drugs.

(5) That the Accused did not open nor touch the drugs (P7A to P7J) found support in the evidence of Zulkifli and Constable 92520 Mohd. Ali bin Ibrahim (PW2 - Ali) respectively. Both stated that on the ten packages of drugs (P7A to P7J), fingerprints could not be lifted.

Both also stated that fingerprints could not be lifted on the blue cloth bag (P3B) notwithstanding the admission of the Accused in the cautioned statement that he carried and put the blue cloth bag onto the motorcycle.

With the negative fingerprint report especially in regard to exhibits (P7A to P7J), the question of knowledge on the part of the Accused in regard to the drugs diminished further into oblivion.

(6) The prosecution harped on the incriminating part of the cautioned statement in particular that part where the Accused stated that he suspected that the package contained drugs. However, this suspicion of the Accused was removed by a positive averment by Ah Hoong to the Accused that the contents of the packages were not drugs and that the Accused was told by Ah Hoong not to be afraid. The subsequent conduct of the Accused, *viz* at the time of arrest would positively show that the "suspicion" if it existed, had been removed by Ah Hoong's assurance. In short, his behaviour at the time of his arrest was consistent with his innocence.

All the salient points adumbrated above, considered together created grave doubts in my mind. And any doubt which existed ought to be given to the Accused. I have drawn inference favourable to the Accused from a set of facts available to the Court. This move is clearly accepted and approved by the Supreme Court in the case of *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791.

The failure of the prosecution to adduce sufficient evidence to establish that there was no break in the chain of evidence relating to the exhibits until they reached this Court confounded the matter further. It weakens and creates a doubt, which doubt should rightly be given to the Accused.

The prosecution also laid great stress at the failure of the Accused to supply further details pertaining to Ah Hoong and consequently it was impossible for the police to trace Ah Hoong. It must be stressed that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt (see *Public Prosecutor v. Saimin & Ors.* [1971] 2 MLJ 16. There is no similar burden placed on the Accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, the duty of the Accused is merely to cast a reasonable doubt in the prosecution case (see *Mohamad Radhi bin Yaacob v. PP* [1991] 3 MLJ 169).

The facts disclosed in the course of the prosecution case including the cautioned statement tended to show that the Accused's explanation in his cautioned statement as to the circumstances whereby he came to be riding the motorcycle could probably or reasonably be true. As to the question of possession of the ten packages and knowledge that the ten packages contained raw opium, the Accused's cautioned statement entirely negatived knowledge on his part. To my mind the cautioned statement and the evidence discussed above negatived the

presumption under s. 37(d) of the Dangerous Drugs Act 1952 that he knew the nature of the thing under his control to be "dadah".

The crux of the charge against the Accused was that he trafficked in the raw opium. The presumption under s. 37(da)(v) of the Dangerous Drugs Act 1952, predicated on "possession" of 1,000 grammes or more in weight of raw opium, is that he trafficked in it. But the cautioned statement and the evidence discussed above negatived trafficking on the part of the Accused.

On all the evidence before me, I was fully satisfied that sufficient reasonable doubt had been cast by the defence during the prosecution case itself as to the knowledge and possession of 16.735 kilogrammes of raw opium by the Accused. In the circumstances, on all the evidence adduced at the close of the prosecution's case, the Court found that the prosecution had failed to establish a *prima facie* case which, if unrebutted, would warrant the conviction of the Accused. The Court accordingly found the Accused not guilty, acquitted and discharged him without calling for his defence.

PUBLIC PROSECUTOR

v.

LIN CHIEN PANG AKA "TEACHER LIN" "SAENWOO ASUE"

HIGH COURT, KUALA LUMPUR
DATUK HJ. MOKHTAR HJ. SIDIN J.
[FEDERAL TERRITORY CRIMINAL APPLICATION NO: 44-58-92]
19 JANUARY 1993

CRIMINAL LAW AND PROCEDURE: Extradition - Importation of heroin into the United States - Prima facie evidence - Examination of offence in the light of Malaysian laws - Whether offences were extra-territorial in nature - Offence committed outside jurisdiction.

EVIDENCE: Offences of conspiracy, aiding and abetting - Accomplice - Affidavit evidence - Not cross-examined - Probative weight - Corroboration by independent witness.

The respondent is alleged to have committed two offences, namely

(i) conspiracy to import into the United States (US), heroin in excess of 1 Kg. in violation of certain provisions of the United States Code; and
(ii) importing in excess of 1 Kg. of heroin in the US as an aider and abettor, in violation of the said Code.

The US government had requested that the respondent be extradicted in relation to the said two offences.

The learned Sessions Court Judge had held that the offences against the respondent had been proved but ordered the respondent to be discharged under s. 19(4) of the Extradition Act 1992 (the said Act) on the ground that the offences committed by the respondent were extra-territorial in nature and therefore were not extradition offences under the said Act.

The applicant applied under s. 37 of the said Act for a review of the decision of the learned Sessions Court Judge. The prosecution evidence against the respondent was based entirely on the affidavit of one Li Yong Jing, who had been arrested for the importation of heroin, the subject matter of the offences for which the respondent was charged. It was an undisputed fact that the respondent had never set foot in the US.